8

STATE OF MICHIGAN

IN THE SUPREME COURT

On Appeal From The Court Of Appeals
Fitzgerald, PJ and Bandstra and Kelly, JJ

ANNABELLE R. HARVEY, Beneficiary of successor to Paul Harvey, deceased, and MICHAEL F. MERRITT, - Judge, retired, substituted for Bruce A. Fox, Judge, retired.

Plaintiffs-Appellees,

v

STATE OF MICHIGAN, STATE OF MICHIGAN DEPARTMENT OF MANAGEMENT AND BUDGET, STATE OF MICHIGAN BUREAU OF RETIREMENT SYSTEMS AND THE JUDGES' RETIREMENT BOARD FOR THE STATE OF MICHIGAN, JOINTLY AND SEVERALLY,

Defendants-Appellants.
_____/

Supreme Court No. 121672

Court of Appeals No. 227140

Ingham Circuit No. 94-77760-AZ

BRIEF ON APPEAL - APPELLEES

ORAL ARGUMENT REQUESTED

The Appeal Involves A Ruling That A Provision Of The Constitution, A Statute, Rule Or Regulation, Or Other State Governmental Action Is Invalid

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TABLE OF CONTENTS

TABLE OF CONTENTS

TABLE OF CONTENTS

TABLE OF CONTENTS

INDEX OF AUTHORITIES

INDEX OF AUTHORITIES

INDEX OF AUTHORITIES

CASES — **PAGES**

STATUTES AND COURT RULES

INDEX OF AUTHORITIES

CONSTITUTIONAL PROVISIONS

COUNTER-STATEMENT OF QUESTIONS PRESENTED FOR REVIEW

I.

HAVE DEFENDANTS PRESENTED ADMISSIBLE EVIDENCE SHOWING THAT THEY WERE ENTITLED TO SUMMARY DISPOSITION?

The trial court answered "Yes" and the Court of Appeals answered "No".

Plaintiffs contend that the answer is "No".

II.

SHOULD THE "INTERMEDIATE SCRUTINY" TEST AND NOT THE "RATIONAL BASIS" TEST BE USED TO DECIDE PLAINTIFFS' EQUAL PROTECTION CLAIM?

The trial court did not answer this question. The Court of Appeals answered "No".

Plaintiffs contend that the answer is "Yes".

III.

DOES THE JRA AS CHALLENGED BY PLAINTIFFS VIOLATE THE EQUAL PROTECTION CLAUSE OF MICH. CONST. 1963 ART. 1, § 2 REGARDLESS OF WHETHER THE "INTERMEDIATE SCRUTINY" OR "RATIONAL BASIS" IS EMPLOYED?

The trial court answered "No" and the Court of Appeals answered "Yes" regarding the "intermediate scrutiny" test. Neither the trial court nor the Court of Appeals answered this question regarding the "rational basis" test.

Plaintiffs contend that the answer is "Yes".

COUNTER-STATEMENT OF QUESTIONS PRESENTED FOR REVIEW

IV.

MAY THIS COURT GRANT PLAINTIFFS THE PROSPECTIVE DECLARATORY AND INJUNCTIVE RELIEF THAT THEY HAVE REQUESTED?

Neither the trial court nor the Court of Appeals answered this question.

Plaintiffs contend that the answer is "Yes".

STANDARDS OF REVIEW

Defendants have correctly stated the standards of review in their Brief on Appeal.

COUNTER-STATEMENT OF PROCEEDINGS

Defendants' Introduction and their "Procedural Facts" contained within their Statement of Proceedings and Facts completely ignore action taken by Plaintiffs in the trial court and in this Court which substantially affects the discussion of the relief that may be afforded to Plaintiffs. During a hearing on Defendants' Motion for Summary Disposition before the Ingham County Circuit Court on May 3, 1995, Plaintiffs waived any claim for monetary damages and clearly indicated that they were seeking only declaratory and injunctive relief (Defs' Apx., p.52a).[1] Then, in granting summary disposition to Defendants the first time, the Ingham County Circuit Court referenced the agreement of the parties that Plaintiffs' claims, demand and prayer for money damages was stricken and deleted from this action (Defs' Apx., p.20a). In their Brief in Opposition to Application for Leave to Appeal, Plaintiffs reiterated that "they did not seek monetary damages or retrospective relief" and that they seek "only prospective declaratory and injunctive relief" (at p.20).

Further, Plaintiffs are no longer pursuing allegations complaining of a disparity in salaries between Judges of the 36th District Court and themselves or disparities in required

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1 References to "Defs' Apx." are citations to the Appendix filed by Defendants/Appellants.

contributions into the retirement system. Therefore, their claim is now limited to future retirement benefits.

In remanding to the Ingham County Circuit in *Harvey I*,[2] the Court of Appeals clearly put the burden on Defendants to develop a factual record showing that the disparity in treatment of 36th District Court judges as compared to Plaintiffs was substantially related to an important state interest. The Defendants introduced no evidence but merely moved for summary disposition again on exactly the same record.

Defendants have failed to accurately represent the second Opinion and Order of the Ingham County Circuit Court dated March 29, 2000 which also granted summary disposition to Defendants (Defs' Apx., pps. 24a-33a). As will be shown, the Circuit Court did not follow "established case law in Michigan" and its decision was properly reversed.

In *Harvey II*, the Court of Appeals acknowledged Defendants' burden of proof and noted that Defendants offered nothing to develop a factual record to sustain their burden (Defs' Apx., p.36a).

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2 The Court of Appeals' January 3, 1997 unpublished opinion included in Defendants' Appendix (Defs' Apx., pps. 22a-23a) will be referred to as "*Harvey I*". The Court of Appeals' May 10, 2002 opinion for publication included in Defendants' Appendix (Defs' Apx., pps. 34a-38a) will be referred to as "*Harvey II*".

COUNTER-STATEMENT OF FACTS

The pertinent facts could not be simpler and are set forth in the first paragraph of "Factual Background and Prior Proceedings" section of the Court of Appeals' Opinion in *Harvey II* (Defs' Apx., pps. 34a-35a). Annabelle Harvey's deceased husband and Michael Merritt are former District Court Judges who served in Districts other than the 36th District Court in Detroit. In their Complaint they contend that the provisions of the Judges Retirement Act of 1992 ("The JRA") which guarantee 36th District Court judges a greater retirement benefit than Plaintiffs are entitled to receive deny them the equal protection of the laws in violation of the Mich. Const. 1963 Art. I, § 2 (Defs' Apx., pps. 42a-44a). Defendants' Brief does not contest the existence of that disparity or any of the facts summarized by the Court of Appeals in *Harvey II*.

ARGUMENT

I. DEFENDANTS HAVE FAILED TO PRESENT ADMISSIBLE EVIDENCE SHOWING THAT THEY WERE ENTITLED TO SUMMARY DISPOSITION

Defendants claim that they were entitled to summary disposition pursuant to MCR 2.116(C)(10). It could not be more clear that evidence offered in support of or in opposition to a motion based upon subsection (C)(10) of Rule 2.116 "...shall be considered only to the extent that the content or substance would be admissible as evidence to establish or deny the grounds stated in the motion" (MCR 2.116(G)(6)). See also *Maiden v Rozwood*, 461 Mich 109, 121; 597 NW2d 817 (1999).

Defendants try to justify inequities existing in the Judicial Retirement System ("JRS"), including the disparity which is the subject of this action, by reliance upon the legislative analyses of the Court Reform Act ("CRA") as set forth in Defendants' Appendix (Defs' Apx., pps. 78a-92a). Those legislative analyses are irrelevant, inadmissible and should be disregarded. The CRA is **not** the subject of Plaintiffs' Equal Protection claim. They have challenged only The Judges Retirement Act of 1992 ("The JRA"), about which Defendants have offered no legislative analysis. Further, Michigan has no official legislative history. Analyses of legislative bills such as those referenced by Defendants "are not official statements of legislative intent". *Detroit Edison*

Company v Celadon Trucking Company, 248 Mich App 118, 124; 638 NW2d 169 (2001).

Likewise, "facts" about so-called local pension plans available to Plaintiffs or other judges are irrelevant and thus inadmissible. At issue is the constitutionality of The JRA, not locally provided retirement benefits, and the constitutionality of The JRA must be determined solely by reference to the terms of The JRA without regard to any local ordinances, charters or other measures employed to afford local pensions. *Rassner v Federal Collateral Society, Inc.*, 299 Mich 206, 215; 300 NW2d 45 (1941) and *Judicial Attorneys Association v State of Michigan*, 459 Mich 291, 304; 586 NW2d 894 (1998).

To summarize, so-called "facts" set forth in unofficial legislative analyses about the CRA and "facts" about local pension plans are irrelevant (MRE 401) and are therefore inadmissible into evidence (MRE 402). Accordingly, per the terms of MCR 2.116(G)(6) they cannot be relied upon by Defendants to argue that they were entitled to summary disposition pursuant to MCR 2.116(C)(10) and should not be considered in deciding Defendants' appeal.

It is also beyond dispute that this Court's consideration of Defendants' appeal is limited to a consideration of the record below. *Rinke v Rinke*, 330 Mich 615, 628; 48 NW2d 201 (1951). Defendants have made no showing that the "facts" upon which they attempt to rely to justify the disparities inflicted upon

Plaintiffs by The JRA were presented below.

Defendants also have violated the mandates of MCR 7.306(A) and 7.212(C)(6) since their statement of so-called "Substantive Facts", with very few exceptions, lacks specific page references to the transcript, pleadings or other documents or papers filed with the trial court. Even if the legislative analyses about the CRA were relevant and admissible - which they are not - the do not contain the "facts" offered by Defendants. The "Substantive Facts" set forth in their Brief are nothing more than the arguments of their attorney and must be disregarded.

II. THE "INTERMEDIATE SCRUTINY" TEST SHOULD BE USED TO DECIDE PLAINTIFFS' EQUAL PROTECTION CLAIM

A. *Manistee Bank v McGowan* Is Still Viable

In granting Defendants leave to appeal this Court directed the parties to address in their Briefs the current viability of *Manistee Bank & Trust v McGowan*, 354 Mich 655; 232 NW2d 636 (1975). Defendants concede that it is still viable (Defs' Brief, p.14). Defendants are correct. *Doe v Department of Social Services*, 439 Mich 650, 662, n.18; 487 NW2d 166 (1992) expressly acknowledges *Manistee Bank* and *Crego v Coleman*, 463 Mich 248; 615 NW2d 218 (2000) acknowledges the continued existence of the "intermediate level of review" such as was employed in *Manistee Bank*. Both *Doe* and *Crego* were cited by Defendants.

B. *Manistee Bank's* "Intermediate Scrutiny" Test Should Be Employed In This Case

The "intermediate scrutiny" test employed by the Court of Appeals is the appropriate test to be employed in this case. The Court of Appeals correctly ruled in this action that provisions of The JRA which granted higher retirement benefits to 36th District Court Judges than to non-36th District Court Judges violated the Equal Protection Clause of the Michigan Constitution. In reaching its conclusion, the Court of Appeals properly employed the "intermediate scrutiny" or "substantial relationship to the object" test in ruling upon Plaintiffs' Equal Protection claim.

Defendants correctly note that Equal Protection claims are subject to one of three standards of judicial scrutiny: 1) strict scrutiny; 2) intermediate scrutiny or substantial relationship; or 3) rational basis. *Crego v Coleman, supra*. The question under the "intermediate scrutiny" test is whether the statutory classification is "substantially related to an important governmental objective" and the question under the "rational basis" basis test is whether the classification is "rationally related to a legitimate government purpose". *Id.*, 463 Mich at pps. 259-260. However, Defendants ignore and fail to distinguish prior rulings of this Court and of the Court of Appeals which have employed the "intermediate scrutiny" or "substantial relationship to the object" test to legislation such as the provisions of The JRA in question here that carve out a distinct exception to a general rule:

> ...where the challenged statute carves out a discrete exception to a general rule and the statutory exception is no longer experimental, the substantial-relation-to-the-object test should be applied.
>
> * * *
>
> Where a classification scheme creates a discrete exception to a general rule and has been enforced for a sufficiently long period of time that all the rationales likely to be advanced in its support have been developed, a court should fully examine those rationales and determine whether they are sound.
>
> *Manistee Bank, supra*
> 394 Mich at pps.671-672

It is undisputed in this matter that The JRA affords substantially higher retirement benefits to retired 36th District Court Judges than to Plaintiffs (and to other non-36th District Court Judges). Accordingly, The JRA creates a discrete exception to the general rule. *77th District Judge v State of Michigan*, 175 Mich App 681, 691 n.3; 438 NW2d 333 (1989). The Court of Appeals specifically addressed the statutory provisions at issue here in deciding *77th District Judge* and determined that the Equal Protection claim presented should be decided by employing the heightened or intermediate scrutiny test recognized in this Court's decision in *Manistee Bank v McGowan, supra:*

> We deem the test stated in *Alexander* and further explained in *Manistee Bank & Trust Co.* to be controlling.
>
> 175 Mich App at p.690

Therefore, in employing the intermediate scrutiny test in this case, the Court of Appeals correctly followed its prior ruling in *77th District Judge* which involved the **very same** Equal Protection claim as that presented here, i.e. the favored treatment of 36th District Court Judges.

Defendants want this Court to automatically assume that The JRA is addressed to social or economic concerns and that, as a result, the "rational basis" test should be employed. In its decision in 77th *District Judge, supra*, 175 Mich App at p.690, n.3, the Court of Appeals succinctly debunked that argument:

> Statutes fixing levels of judicial compensation and regulating retirement benefits can hardly be understood as a legislative venture into matters of social or economic significance. Although the challenged statutes are no doubt of great interest to the district judges of this state, their subject matter is mundane in terms of a socioeconomic perspective. Moreover, the exclusion of 36th District judges from some of the less favorable terms of employment and their singling out for special privileges fits the characterization of a "discrete exception to a general rule." *Manistee Bank & Trust Co., supra*, 394 Mich. p.671, 232 N.W.2d 636.

Defendants have not even attempted to refute that sound, logical analysis. That is because they cannot. The intermediate level of scrutiny should be employed in this case because: (1) The JRA is not addressed to social or economic matters of general concern; and (2) Plaintiffs are attacking the favored treatment of

retired 36th District Court Judges as a "discrete exception to the general rule".

In essence, Defendants' argument is merely that the intermediate scrutiny test has been diluted by subsequent rulings of various courts and, therefore, is no longer applicable. However, Defendants have failed to cite a case which overrules the holding of this Court in *Manistee Bank* and Defendants admit that it is still viable. Defendants cite an unpublished Court of Appeals decision *Walsh v Walsh* (Defs' Apx., pps.106a-111a), a divorce action in which the Court of Appeals acknowledged that this Court has **not overruled** its ruling in *Manistee Bank*. The unpublished Court of Appeals decision, which merely suggests that this Court no longer employs the *Manistee Bank* test, is clearly not binding precedent (MCR 7.215(C)(1)) and of course does not control this Court's decision. Furthermore, the unpublished Court of Appeals decision fails to address the situation presented here, in *Manistee Bank*, and *in 77th District Judge* where a discrete exception to a general rule was at issue.

C. Defendants' Cases Are Distinguishable

Defendants have cited no authority for the proposition that *Manistee Bank's* intermediate scrutiny test is to be employed only where classifications involving gender or mental capacity are involved. *Manistee Bank* does not involve either of those subjects. This Court observed in *Doe v Department of Social Services, supra*, that the intermediate test "...has not been so restricted...",

citing two cases relied upon by Defendants in their brief[3] and *Manistee Bank* (439 Mich at p.662, n.19). In *77th District Judge, Manistee Bank's* intermediate test was applied to the very issue presented here: the favored treatment of retired Judges of the 36th District Court as compared to the treatment of retired District Judges who served in other Districts.

Defendants also suggest that in *Hughes v Judges' Retirement Board*, 407 Mich 75; 282 NW2d 160 (1979) this Court concluded that the rational basis test must be used in all Equal Protection actions involving judges' retirement matters. Such a statement is an overstatement of the holding of this Court in that case. *Hughes* dealt primarily with the issue of the retroactive application of amendments to The JRA which increased benefits for sitting judges but not for retired judges. This Court determined that it was the intent of the Legislature not to afford the increased benefits to retirees and that such an application did not deny equal protection of the law to judges who had already retired from the system. *Hughes* did not involve a distinct exception to the general rule as presented in this case because in *Hughes* **all** retirees were treated alike as were all active members of the retirement system; the retirees were not treated differently depending upon the geographic unit in which they had served. Here, 36th District Court Judges are excepted from the general rule, i.e. the treatment that is

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3 *Plyer v Doe*, 457 U.S. 202; 72 L.Ed.2d 786; 102 S.Ct. 2382 (1982) and *Metro Broadcasting, Inc. v Federal Communications Commission*, 497 U.S. 547; 1105 S.Ct. 2997; 171 L.Ed.2d 445 (1990).

afforded to Plaintiffs and to all other non-36th District Court Judges.

In re Pensions of 19th District Judges, 213 Mich App 701; 540 NW2d 784 (1995), also involved facts unlike those present here. In that case, **all** persons who participated in another public retirement plan were treated exactly the same; they were excluded from the City of Dearborn's retirement plan. It was for that reason that the Court of Appeals distinguished *77th District Judge* and declined to employ the intermediate standard of review ("Here, unlike in *77th District Judge*, the disparity in treatment is based only on participation in another retirement plan") (213 Mich App 705). In this case, Plaintiffs and other District Judges are disadvantaged by The JRA as compared to Judges of the 36th District Court without regard to whether or not they participate in a local retirement plan. Therefore, the analysis in *19th District Judge* is inapplicable here.

Recent decisions support the conclusion that the intermediate scrutiny test is still viable and should be applied in analyzing a challenge to a statute that carves out a discrete exception to a general rule. See, for example, *Neal v Oakwood Hospital Corporation*, 226 Mich App 701, 718; 575 NW2d 68 (1997), cited by Defendants, which recognizes that the test employed in *Manistee Bank* is still applicable in situations such as the one presented here.

In *Neal*, the Court of Appeals declined to apply the *Manistee*

Bank test because the statute in question was still "experimental", which is no longer true here. The statutory provision in question here has been in existence for over twenty two years and is no longer experimental. This conclusion was reached by the Court of Appeals fourteen years ago in *77th District Judge*:

> Although defendant suggests that the particular compensation package afforded 36th District judges is attributable to the transition from those judicial positions superseded by the creation of the 36th District Court, it remains to be explained what significance these historical facts have at this present time or why they serve to justify more favorable compensation and benefits
>
> 175 Mich App at p.691

Defendants cite other cases which hold that the rational basis test should be employed when analyzing a Equal Protection claim with reference to social and economic legislation. However, none of the cases cited by Defendants involve legislation where a distinct exception has been created to a general rule. Accordingly, per this Court's decision in *Manistee Bank* and the Court of Appeals' decision in *77th District Court Judge*, it is obvious that the intermediate level of scrutiny test is applicable to this matter. Moreover, as will be shown, regardless of the test employed by this Court it is patently obvious that the more favorable treatment afforded retired 36th District Court Judges *vis-à-vis* Plaintiffs and all other retired non-36th District Court Judges cannot be sustained under any standard of Equal Protection scrutiny.

compounds the favored treatment for Judges of the 36th District Court who retired between those dates because the same percentage increase is applied to their retirement benefit which is already higher.

III. THE JRA VIOLATES THE EQUAL PROTECTION CLAUSE REGARDLESS OF WHETHER THE "RATIONAL BASIS" OR "INTERMEDIATE SCRUTINY" TEST IS USED

It is undisputed that Plaintiffs are treated in a substantially different fashion than 36th District Court Judges with respect to the amount of retirement benefits that they receive.[5] Defendants do not dispute the disparity,[6] but seek to defend it by arguing that Plaintiffs are not similarly situated to 36th District Court Judges and that the disparity passes muster under both the "rational basis" and the "intermediate scrutiny" tests. Defendants are wrong.

A. The Plaintiffs Are Similarly Situated To The Persons To Whom They Compare Themselves

Defendants state that the constitutional guarantee of equal protection mandates that persons "similarly situated" be treated equally but then argue, in essence, that Plaintiffs' Equal Protection claim should not succeed because Plaintiffs are not in

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5 The JRA is very obtuse, perhaps deliberately so that its inequities are not as readily apparent. Nevertheless, those disparities are clearly explained in *77th District Judge, supra*, 175 Mich App at pps.686-688.

6 In prior cases Defendants have admitted the disparity. See, for example *77th District Judge, supra*,175 Mich App at p.684 ("The facts demonstrating disparate treatment between 36th District judges and other district judges are stipulated").

identical circumstances to persons to whom they are comparing themselves. None of Defendants' arguments demonstrate that Plaintiffs are not "substantially similar" to retired Judges of the 36th District Court, the persons to whom they compare themselves. Comparison for purposes of an Equal Protection claim does not require "identical" features, only "common" features and courts "have...been careful not to define the requirement too narrowly". *Chavez* v *Illinois State Police,* 251 F.3d 612, 636 (7th Cir., 2001).

Defendants try to rely upon differences existing in the treatment that Plaintiffs are afforded under The JRA to argue that they are not similarly situated to Judges of the 36th District Court. Those differences are the very object of this lawsuit and what is under attack and cannot be used to argue that the Plaintiffs are not similarly situated to 36th District Court Judges who are afforded more favorable treatment.

The Plaintiffs and all of the 36th District Court Judges to whom they compare themselves are (or were) in the same retirement system. That alone establishes that they are similarly situated.

Plaintiffs, who are a former District Court Judge and a widow of a District Court Judge who served in Districts other than the 36th District, are most definitely similarly situated with 36th District Court Judges. Their salaries and duties were identical and there is no difference between them but for the geographic territory in which they served.

Defendants also argue that Plaintiffs are not similarly

situated to retired 36th District Court Judges because they had different retirement elections available to them under local retirement plans. Defendants' attempt to differentiate the Plaintiffs on that basis should not succeed. Plaintiffs' suit addresses the **state** benefits afforded all District Court Judges by The JRA, and not any enhanced benefits that a District Court judge may "buy" from the JRS or may be afforded locally. There is no state statute that affords Plaintiffs any local retirement benefits. Under Defendants' flawed argument, non-36th District Court Judges who maintained private IRA accounts or had retirement benefits available from employment in the private sector would not be similarly situated to 36th District Court Judges for receiving retirement benefit payments under The JRA.

Defendants have not cited a case in which a plaintiff was not entitled to pursue a claimed violation of the Equal Protection Clause on the grounds that he/she was not similarly situated to the persons to whom they compared themselves. In *Plyer* v *Doe*, 457 U.S. 202; 102 S.Ct. 2382; 72 L.Ed.2d 786 (1982) (cited by Defendants in support of their argument that Plaintiffs do not satisfy the "similarly situated" requirement), the United States Supreme Court engaged in an Equal Protection analysis by which the treatment of undocumented (illegal alien) children was compared to that of children who were U.S. citizens or legal aliens. In *El Souri* v *Department of Social Services*, 429 Mich 203; 414 NW2d 679 (1987) this Court compared the treatment of sponsored legal resident

aliens to other applicants for welfare benefits. These Plaintiffs are certainly more "similarly situated" to retired Judges of the 36th District Court than the plaintiffs in *Plyer or El Souri* were to the groups to which they were compared.

B. Defendants Have Admitted Intentional Discrimination

Defendants argue that Plaintiffs must demonstrate that The JRA evidences intentional discrimination against them. Defendants have **admitted** intentional discrimination. In fact, they have tried to justify favored treatment of retired Judges of the 36th District Court on the grounds that special treatment was part of the scheme of the CRA! The following excerpt from Defendants' Brief evidences that the better treatment of Judges of the 36th District Court as compared to Plaintiffs was intentional:

> The Legislature's decision to place all judges from the newly-created 36th district court into the Judges Retirement System and provide them with a slightly different pension system than non-36th district court judges...was part and parcel of the start of the reorganization of the State's court system.
>
> Defs' Brief, p.23

In *People v Conat*, 238 Mich App 134; 605 NW2d 49 (2000), cited by Defendants, the Court of Appeals ruled that the plaintiffs failed to show intentional discrimination because they attacked decisions that prosecutors had discretion to make, but were not required to make, under the statutes in question. Here, absolutely no discretion is involved in the disparate treatment afforded to

retired Judges of the 36th District Court as compared to Plaintiffs: The JRA by its terms automatically discriminates against the Plaintiffs.

C. Defendants Cannot Justify The Disparate Treatment Of Plaintiffs By Reference To Local Retirement Plans

It is well established that the constitutionality of The JRA must be determined **solely** by reference to the terms of The JRA without regard to local ordinances, charters or other devices employed to afford local pensions. *Rassner v Federal Collateral Society, supra* and *Judicial Association v State of Michigan, supra*. Defendants have not cited a single case that stands for the proposition that the constitutionality of The JRA can be established by reference to locally offered retirement benefits, which can be changed at the whim of the local unit of government offering the benefit and do not depend on action by the Michigan Legislature for their existence or elimination.

Indeed, Defendants previously acknowledged and admitted to this Court that "...a particular judge's locally - established retirement plan... is something over which the Michigan Legislature has no control" (Defendants' Application for Leave to Appeal, p.9). That is precisely why the "entire statutory scheme" which Defendants argue should be considered **does not** include provisions of local retirement plans.

Defendants write repeatedly about the so-called "entire statutory scheme" but do not, and cannot, cite any provision of The

JRA, the CRA or any other Michigan act or statute which affords Plaintiffs retirement benefits equivalent to those paid to retired 36th District Judges. Therefore, the fact that certain provisions of The JRA acknowledge the possible existence of local plans, which local plans may or may not afford retirement benefits to District Court Judges from outside of the 36th District and which may or may not charge them for local benefits afforded, is completely irrelevant.

The cases cited by Defendants do not support their argument that the terms of local retirement plans that may (or may not) be available to Plaintiffs should be considered to decide whether the Equal Protection Clause has been violated. *Dearborn Township Clerk v Jones*, 335 Mich 658; 57 NW2d 40 (1953) involves statutory construction and does not involve an Equal Protection claim. *Council of Organizations and Others for Education About Parochiaid v Governor*, 455 Mich 557; 566 NW2d 208 (1997) involves the interpretation of constitutional provisions but also does not involve an Equal Protection claim. In *Drewes v Grand Valley State College*, 106 Mich App 776; 308 NW2d 642 (1981), the Court of Appeals examined the terms of the Michigan Workers' Disability Compensation Act but did not look at any other statute, let alone a local ordinance or charter provision. *In re Request for Advisory Opinion on Constitutionality of 1986 P.A.* 281, 430 Mich 93; 422 NW2d 186 (1988) does not involve an Equal Protection issue and this Court looked only at the terms of the Local Development Financing

Act and not at any other statute or any local ordinance or charter provision.

Defendants' references to statutes such as the Charter Counties Act, the County Boards of Commissioners Act, the Municipal Employees Retirement Act, The Combined Retirement Systems Act, The County Employees' Civil Service System Act, and The Calculation of Retirement Benefits by Local Units of Government Act are most puzzling. Defendants have pointed to no provision in any of those acts - just as they have failed to identify any provision in The JRA or even in the CRA - which affords these two Plaintiffs retirement benefits equivalent to those paid to retired Judges of the 36th District Court. Therefore, the references to those acts, which were not relied upon by Defendants below, provide absolutely no support for Defendants' argument that the constitutionality of The JRA may or should be determined by a consideration of the local retirement plans in which these two Plaintiffs may participate.

Plaintiffs have advanced the same argument here that was correctly rejected by the Court of Appeals in the *Harvey II*:

> The trial court reasoned that other statutes grant local funding units the authority to provide a judicial retirement pension and, in fact, that many such units do provide a pension supplementary to that afforded by the statutes at issue here. The court further noted that, pursuant to that authority, at least one funding unit has provided a local pension which, when combined with the pension afforded by the challenged state system here, is greater than the pension afforded to

> similarly situated 36th District judges. The trial court reasoned that, because some outstate judges might receive equal or better total retirement benefit treatment than do 36th District Court judges, the equal protection challenge fails.
>
> We find this reasoning erroneous. The gist of plaintiffs' complaint is that the state, through the statutes challenged, has guaranteed to the 36th District Court judge retirees a level of retirement benefits that is not guaranteed to outstate judges. That is in fact the case and, with that conclusion, equal protection analysis appropriately should end. It does not matter that some outstate judges might, depending on the largess of their local funding units, receive a total retirement benefit equal to or better than that afforded to 36th District Court judges. What matters is that outstate district court judges retirees do not receive the same statutorily guaranteed benefit as do 36th District Court judge retirees.
>
> *Harvey II*, Defs' Apx., p.38a

This Court should reject Defendants' argument for the same reason.

D. There Is No Rational Basis For The Disparate Treatment Of The Plaintiffs

Even if the "rational basis" test is applied to The JRA instead of the "intermediate scrutiny" test which the Court of Appeals and Plaintiffs believe is applicable, it is still readily apparent that The JRA does not pass constitutional muster. There exist no facts which demonstrate that the disparity in retirement benefits payable to 36th District Court Judges as compared to

Plaintiffs is rationally related to a legitimate government purpose. Rather, the undisputed facts show that the provisions of The JRA being challenged are arbitrary and are not rationally related to any objective of that act. *Crego v Coleman, supra*, 463 Mich at p.259.

1. The Legislative Analyses Offered By Defendants Do Not Show That The Terms Challenged Are Rationally Related To A Legitimate Government Purpose

Defendants try to justify inequities created by The JRA by references to the legislative analyses of the CRA. Indeed, Defendants' entire argument is based upon the CRA, **not** The JRA which is at issue. However, the legislative analyses about the CRA offered by Defendants are inadmissible and should be disregarded. See Section I, supra.

Defendants offer nothing that shows that 1951 PA No. 198, which was the Public Act that had established the JRS at the time the CRA was enacted, was intended to in any way further the purposes of the CRA. Additionally, 1951 PA No. 198 has been repealed by §607 of The JRA (MCLA 38.2607; MSA 27.125(607)). (Pls' Apx., p.84b).

The purpose of The JRA is stated in its preamble as follows:

> AN ACT to establish a judges retirement system; to provide for the administration and maintenance of the retirement system; to create a retirement board; to prescribe the powers and duties of the retirement board; to establish certain reserves for the retirement system; to

> establish certain funds; to prescribe the powers and duties of certain state departments and certain state and local officials and employees; to prescribe penalties and provide remedies; and to repeal certain acts and parts of acts. (emphasis added)
>
> Pls' Apx., p.77b

Nothing in that preamble evidences an intent to reorganize the State's court system, to provide assistance to Detroit on account of its financial woes, etc. In their annual financial report,[7] Defendants proclaim:

> The purpose of the [Judicial Retirement] System is to provide benefits for all judges.
>
> Pls' Apx., p.5b

They do not state the purpose of the JRS or of The JRA is as they claim in their Brief.

Further, The JRA has failed in its stated purpose, i.e. "...to establish a judges retirement system...". It has permitted the perpetuation of a crazy quilt system under which substantial and unfair disparities exist in the retirement benefits to which retired District Judges are entitled.

Even if this Court reviews the legislative analyses relied upon by Defendants, they do not support Defendants' contention that the disparity in retirement benefits complained of here by Plaintiffs is rationally related to any legitimate governmental

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7 The JRS annual financial report will be discussed in greater detail in Section IV, *infra*.

purpose. The theme of the analysis regarding House Bill 5630 is the eventual State funding of all court operations, the theme of the analysis regarding House Bill 4399 is legislation to prevent certain judges from being able to "double dip" on retirement benefits, and the theme of the analyses regarding House Bills 5711, 5749 and 5748 is the standardization of judicial salaries to prepare for the total state funding of the judicial system (which obviously has not occurred as of March, 2003).

Further, the legislative analyses offered by Defendants' show that the purpose of the CRA was to create a state wide **uniform** court system that was to be entirely state funded. The retirement benefit disparity under attack here does the exact opposite of what the legislative analyses contemplated: it creates a non-equal, non-uniform system that is not entirely state funded.

Without waiving their argument that legislative analyses are totally irrelevant, Plaintiffs suggest that the Court should note that Defendants failed to provide the Court with the legislative analysis of The JRA, a copy of which is included in Plaintiffs' Appendix (Pls' Apx.,pps.75b-76b). The reason for Defendants' omission is obvious: the legislative analysis for The JRA does not support Defendants' argument and indicates that the sole purpose of The JRA was to combine the Probate Judges Retirement System with the JRS (*Id.*). The disparity in retirement benefits challenged by Plaintiffs is not related to that purpose in any way, shape or form.

2. The Disparity In Retirement Benefits Does Not Result In The Efficient Operation Of The Courts

The only "rational purpose" suggested by Defendants for the favored treatment of retired Judges of the 36th District Court is "...the efficient operation of Michigan's court system within the available fiscal resources" (Defendants' Brief, p.22). As shown above, the preamble to The JRA and Defendants' annual financial report directly contradict their claim in their Brief about the purpose of The JRA.

However, even assuming for purposes of argument that the legitimate government purpose to be served is as stated in Defendants' Brief, it remains a mystery how that purpose is currently served by the disparate retirement benefits at issue. The appropriate question is whether the legislative classification "**is** rationally related" to a legitimate governmental purpose (*Dillinger* v *Schweiker*, 762 F.2d 506, 508, (6th Cir., 1985)(emphasis added) (cited by Defendants), not whether it **was** rationally related more than 20 years ago.

Defendants have made no showing that Michigan's court system is today more efficient because Judges of the 36th District Court are entitled to receive higher benefits upon retirement than the Plaintiffs despite the fact that they made a lower contribution into the system. Nor can Defendants show the opposite, i.e. that the current level of efficiency would be adversely affected if the Plaintiffs received retirement benefits equivalent to those paid to

retired Judges of the 36th District Court.

As the Michigan Court of Appeals concluded in *77th District Judge, supra*, 175 Mich App at p. 691:

> Although Defendants suggest that the particular compensation package afforded 36th District judge is attributable to the transition from those judicial positions superseded by the creation of the 36th District Court, it remains to be explained what significance these historical facts have at this present time or why they serve to justify more favorable...benefits.

When faced with the same question, even the Ingham County Circuit Court concluded that:

> ...if the scheme to be scrutinized is simply the statutory scheme for **State** judicial pensions, this legislation, as of the year of 2000, fails the test. It is no longer related to the important governmental purpose of full State funding of judicial salaries or pensions. (emphasis in original)
>
> Defs' Apx., p.28a

The Ingham County Circuit Court noted that when the CRA was enacted in 1980 a goal of October 1, 1988 was set for the State's assumption of costs of all trial court operations but that 20 years later the disparity in Tier 1 pension benefits in favor of 36th District Court Judges remained essentially the same (Defs' Apx., p.27a).

Defendants' Brief does not dispute that on the subject of retirement benefits District Judges are not treated equally nor has the State fulfilled its "goal" of total state funding. The purpose for the CRA is not relevant to Plaintiffs challenge to The JRA.

Further, it is obvious that the State has failed to meet the purported purpose of the CRA and should not be permitted to hide behind it any longer.

3. The Disparity In Retirement Benefits Cannot Be Defended Simply Because It Costs Less Money

Defendants' attempt to justify the disparate treatment of Plaintiffs by its reference to "available fiscal resources" must be disregarded. A concern for the preservation of resources is standing alone insufficient to justify a classification as rational. *Plyer v Doe, supra*, 457 U.S. at p.227; *El Souri, supra* 429 Mich at p.213; and *Graham v Richardson*, 403 U.S. 365, 374-375; 91 S.Ct. 1948; 29 L.Ed.2d 534 (1971) (all cited by Defendants). Otherwise, the State could always defend disparate, discriminatory treatment on fiscal grounds (e.g., it would preserve available fiscal resources if minority students were required to pay higher tuitions to attend state colleges and universities than non-minority students).

4. The Disparity In Retirement Benefits Provided By The JRA Is Completely Unrelated To the Availability Or Non-Availability Of Local Retirement Benefits

The availability of a local pension benefit for some - but not all - non-36th District Court Judges does not show that The JRA operates rationally. Defendants have not shown and cannot show that all non-36th District Court Judges have local pension benefits

or that all local plans are entirely funded by local units. The JRA does not address non-36th District Court Judges who receive no local retirement benefits. The JRA does not distinguish between non-36th District Court Judges who receive local retirement benefits that, when added to the benefits afforded by The JRA, exceed, equal, or are less than the retirement benefits afforded by The JRA to Judges of the 36th District Court. Nor does The JRA distinguish between non-36th District Court judges who have a fully employer funded local retirement plan or a partially employer funded local retirement plan.[8] In short, the alleged unavailability of a local retirement plan for Judges of the 36th District Court cannot justify their preferential treatment under The JRA. With respect to the availability or unavailability of a local retirement plan, The JRA operates irrationally, not rationally.[9] And, if 36th District Court Judges are disqualified

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8 Defendants do not argue that these two Plaintiffs receive local pension benefits that, when added to their benefits afforded by The JRA, equal or exceed benefits afforded by The JRA to Judges of the 36th District Court. Nor have they offered any proof of the cost to Plaintiffs of any local retirement benefits.

9 *Timlin v Myers*, 980 F Supp 1100 (C.D. CA., 1997), involved a pension plan that was successfully attacked for creating unconstitutional classifications. The plan caused the reduction of retirement benefits for state judges who resigned to become federal judges. The justification offered by the state was that it was rational to encourage judges to remain in the state system and to try to preserve resources. However, the plan did not pass Equal Protection scrutiny since it did not adversely affect those who resigned from the state court to enter private practice or those who resigned from state court but became federal judges after being in private practice. The court also found that the statute was not rationally related to the stated goals of preserving retirement fund resources or retaining qualified state judges. Like the plan

from participating in the City of Detroit's pension plan, that is apparently because The JRA designates that they may participate "solely" in the JRS (Defs' Brief, p.7).

5. Defendants Have Not Shown That The Disparity In Retirement Benefits Is Attributable To 36th District Court Judges Having Greater Responsibilities Or Duties

In *77th District Judge, supra,* the Michigan Court of Appeals observed that:

> ...no reason has been put forth explaining why the duties, responsibilities, and circumstances of service obtaining in the 36th District Court provide the basis for any reasonable justification of more favorable treatment than their counterparts in the other judicial districts of the state.
>
> 175 Mich App at p.691

Here, Defendants have also failed to make that showing and Plaintiffs submit that they cannot.

6. Plaintiffs Do Not Argue That All District Judges Must Receive Exactly The Same Retirement Benefit

Plaintiffs do not argue that total equality in retirement benefits is required for **all** retired District Court Judges. They merely contend that the Equal Protection Clause of Michigan's Constitution is violated when retired Judges of the 36th District Court receive a higher retirement benefit than non-36th District

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at issue in *Timlin*, The JRA here is not rationally related to the purposes advanced by Defendants.

judges who retired at the same age with the same length of service simply because of the District in which they served.

7. The Disparities Challenged Cannot Be Successfully Defended Simply Because The JRA Does Not Prohibit Local Units From Making Up The Shortfall

Defendants also attempt to defend The JRA by arguing that local units are not prohibited from providing pension benefits equal to or greater than those afforded Judges of the 36th District Court. That was a basis for the Ingham County Circuit Court's Opinion and Order (Def's Apx., p28a) which was reversed by the Court of Appeals in *Harvey II*. Defendants' argument is foolish and completely without merit. By analogy, if the State passed legislation which provided for the payment of a $1,000 stipend to every citizen except for those whose last names began with the letter K, could the State successfully defend an equal protection claim brought by someone whose last name began with the letter K on the grounds that nothing in the legislation prohibited counties or cities from providing a $1,000 stipend to the Ks? Of course not, but that in essence is what Defendants argue.

C. The Disparate Treatment Of Plaintiffs Cannot Survive The "Intermediate Scrutiny" Test

Defendants concede that if the intermediate scrutiny test is applied, per the directive of the Court of Appeals in *Harvey I*, Defendants have the burden of proving that the provision of The JRA attacked by Plaintiffs is substantially related to an important

governmental interest. In focusing solely upon the terms of The JRA, the Ingham County Circuit Court concluded that Defendants had not satisfied their burden:

> Therefore, if the scheme to be scrutinized is simply the statutory scheme for **State** judicial pensions, this legislation, as of the year 2000, fails to test. It is no longer related to the important governmental purpose of full State funding of judicial salaries or pensions. Moreover, the Court of Appeals expressly noted that the burden was upon Defendant to present evidence from which this Court could infer that the statute serves an important governmental purpose. Defendant has stipulated that no trial is necessary and has presented no documentary evidence from which the Court can draw the mandated inference. (emphasis in original)
>
> Defs' Apx., p.28a

All of the arguments set forth above which demonstrate that the challenged provisions of The JRA do not pass the rational basis test also establish that Defendants failed to carry their burden of proof if the intermediate scrutiny test is applied as it should be. Defendants have not shown that the disparity in retirement benefits payable to Plaintiffs under The JRA as compared to retirees of the 36th District Court is substantially related to an important governmental objective.

IV. THIS COURT MAY AFFORD PLAINTIFFS THE PROSPECTIVE RELIEF THAT THEY SEEK

This Court's Order granting Defendants' Application for Leave

to Appeal directed the parties to brief the issue of "...this Court's ability to order relief requested, inter alia fully state-funded pensions for outstate judges, prospectively and retroactively..." (Defs' Apx., p.39a). While Plaintiffs Complaint includes references to "damages", Plaintiffs have previously waived their claim for money damages. See the transcript of the trial court's May 3, 1995 hearing on Defendants' Motion for Summary Disposition during which Plaintiffs' counsel asked for "...leave to amend to strike the portion of the prayer to delete that portion that asks for any type of money damages" (Defs' Apx., p.52a); the Circuit Court's May, 1995 Order of Summary Judgment acknowledging that Plaintiffs' "...claims, demands and prayer for damages...be stricken and deleted from this action..." (Defs' Apx., p.20a) and the Circuit Court's March 29, 2000 Opinion and Order Granting Summary Disposition to Defendants in which the Circuit Court noted: "...Plaintiffs seek prospective-only declaratory judgment that this scheme denies them the equal protection of the laws." (Defs' Apx., p.259). In their Brief in Opposition to Defendants' Application for Leave to Appeal, Plaintiffs reiterated that:

> "...they do not seek monetary damages or retrospective relief. They seek only prospective declaratory and injunctive relief."
>
> Brief in Opposition to Application for Leave to Appeal, p.20

Therefore, to decide this case, this Court need not consider or decide its ability to make an award of monetary damages or any

retroactive, retrospective relief.

A. None Of The Cases Referenced In The Order Granting Defendants Leave To Appeal Or In Defendants' Brief Preclude This Court From Granting Plaintiffs' Prospective Declaratory And Injunctive Relief

Lewis v State of Michigan, 464 Mich 781; 629 NW2d 868 (2001) does not preclude this Court from finding that The JRA is unconstitutional or from affording Plaintiffs prospective declaratory and injunctive relief upon that finding. In *Lewis*, this Court stated:

> Finally, our holding should not be construed as a demurral to the traditional judicial power to invalidate legislation or other positive governmental action that directly violates the equal protection guarantee of Const. 1963, art. 1, § 2. There is obviously a distinction between a judicial decree ***invalidating*** unconstitutional governmental action and the adoption of judicially created doctrines that effectively serve as de facto statutory enactments to implement Const. 1963, art. 1, § 2. The former is classic judicial review of recognized as a core judicial function since, at least, the decision in *Marbury v Madison*, 1 Cranch (5 U.S.) 137, 2 L.Ed. 60 (1803). The latter is an improper usurpation of legislative authority. To fail to heed this limitation on judicial power would be to fail "to maintain the separation between the Judiciary and the other branches ... by ensuring that judges do not encroach upon executive or legislative authority or undertake tasks that are more properly accomplished by those branches." *Morrison v Olson*, 487 U.S. 654, 680-

> 681, 108 S.Ct. 2597, 101 L.Ed.2d 569 (1988). Accordingly, when the political branches of the state government affirmatively act by adopting legislation or otherwise, we may, in keeping with the traditional judicial role, review that action to determine if it is unconstitutional. (emphasis in original)
>
> 464 Mich at pps. 788-789

Likewise, in *77th District Judge, supra*, after finding that The JRA violated the Equal Protection guarantee of the Michigan Constitution, the Court of Appeals stated:

> We believe that the appropriate remedy under these circumstances should seek to eliminate the offending disparity prospectively.
>
> 175 Mich App at p. 698

Then, the Court of Appeals concluded that the Court of Claims lacked subject matter jurisdiction to afford relief other than money damages, an issue that is not present here since this matter was commenced in Circuit Court. Defendants' argument that the Court of Appeals decided in *77th District Judge* that the Plaintiff lacked a judicial remedy (Defs' Brief, p.19, n.4) is completely wrong. It is unknown why the plaintiff in that case did not refile in Circuit Court, the court in which these Plaintiffs commenced this action.

In their Brief on Appeal, Defendants acknowledge that per the decision in *77th District Judge* prospective relief may be afforded by this Court upon a finding that The JRA is unconstitutional

(Defendants' Brief, p.32).

B. This Court's Decision In *Sharp v City of Lansing* Makes It Clear That This Court May Afford The Prospective Relief Requested

Defendants' argument that there is no judicial remedy available to Plaintiffs is completely incorrect. In *Sharp v City of Lansing*, 464 Mich 792, 800; 629 NW2d 873 (2001) this Court concluded:

> Injunctive and declaratory relief are available to restrain any acts found to violate the state's Equal Protection Clause.

In *Sharp*, this Court expressly rejected the argument that implementing legislation is required for a plaintiff to obtain injunctive and/or declaratory relief for a claimed violation of Michigan's Equal Protection guarantee.

Like this case, *Sharp* involved the claim of a public employee that his equal protection rights guaranteed by Mich Const. Article I, § 2 had been violated. In *Sharp*, which was decided the same day as *Lewis, supra*, this Court reasoned as follows:

> Accordingly, while the state judiciary cannot positively implement art. 1, § 2, the judiciary has the legitimate authority, in the exercise of the well-established duty of judicial review, to evaluate governmental action to determine if it is consistent with the equal protection guarantees of the first sentence of art. 1, § 2 and to invalidate such action if it is not. In short, art. 1, § 2, commands the Legislature to adopt measures to practically implement its equal

> protection guarantees. This "implementation" language does not mean that state and local governmental entities are free to violate the substantive equal protection guarantees of the art. 1, § 2 merely because the Legislature has failed to address a particular type of violation.

Therefore, this Court clearly has the authority to afford Plaintiffs the relief that they seek, prospective declaratory and injunctive relief.

C. This Court May Order Payments To Plaintiffs Out Of The Excess Funds In The JRS

In this case, this Court may order Defendants to pay future retirement benefits to Plaintiffs equal to those paid to retired Judges and beneficiaries of retired Judges of the 36th District Court from excess funds in the JRS. This Court does not have to order the payment of money out of the State Treasury or order the appropriation of money by the Legislature in order to afford Plaintiffs the relief that they seek. According to the Annual Financial Report of the JRS for its fiscal year ended September 30, 2002,[10] the defined benefit plan (sometimes referred to as the Tier 1 Plan) in which Plaintiffs participate is funded to the extent of 127% (Pls' Apx., pps.9b and 15b). Stated another way, as of September 30, 2002 the JRS had approximately $60,000,000 more than is required to pay all of the future actuarially calculated benefit

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10 The JRA commands the JRS to prepare an annual financial report (MCLA 38.2209; MSA 27.125(209)(Pls' Apx., p.78b).

payments that will be required to all defined benefit plan participants and their beneficiaries (*Id.*).[11] The authors of the report state:

> The System is currently overfunded and Management believes the current financial position will continue to improve due to a prudent investment program, cost controls, and strategic planning.
>
> Pls' Apx., p.19b

This Court has rejected the argument that the separation of powers doctrine will be violated if the plaintiffs do not ask the Court to compel the Legislature to appropriate monies and where the relief it affords does not interfere with the Legislature's appropriations process. *City of Adrian v Michigan*, 420 Mich 554, 564-565; 362 NW2d 708 (1985). Similarly, in *Musselman v Governor of the State of Michigan*, 448 Mich 503, 522; 533 NW2d 237 (1995), this Court acknowledged that if the plaintiffs in that case had been able to show the existence of a "pool of funds" available to afford them the relief requested so that this Court would not have to order an appropriation of funds from the State Treasury by the Legislature, this Court would be empowered to grant such relief.

Here, Plaintiffs are able to make that showing. There is a "pool of funds" in the JRS consisting of at least $60,000,000 available from which Defendants could be ordered to pay Plaintiffs

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11 This huge overfunding exists despite the fact that the net assets have diminished in recent years, primarily "due to a sluggish investment market" (Pls' Apx., p.19b).

the prospective retirement benefits to which they are entitled, i.e. benefits equal to those paid to retired Judges of the 36th District Court.

Moreover, the "pool of funds" available to afford Plaintiffs relief was created in large part by Plaintiffs' own contributions into that pool and the gains generated by the investment of their contributions. Also, the "pool of funds" must by the terms of The JRA be held in trust **solely** to pay benefits to members of the JRS such as Plaintiffs (MCLA 38.2604(6); MSA 27.125(604)(6)) (Pls' Apx., p.79b). Indeed, here there exists **exactly** the circumstance envisioned by this Court's decisions in *City of Adrian* and *Musselman* in which this Court recognized that it would be appropriate for this Court to order the prospective payment of monies by Defendants out of a "pool of funds" other than the State Treasury to remedy the clear constitutional violation that Plaintiffs have shown.

Therefore, while this Court instructed the parties to consider Mich Const. 1963, Article III, § 2, and Article 4, § 1, neither of those provisions would be violated if this Court, upon its finding that The JRA is unconstitutional, orders Defendants to pay Plaintiffs future retirement benefits out of the reserves of the JRS Plan equal to those being paid to Judges of the 36th District Court who retired at the same age and with the same length of service. Defendants' claim that affording Plaintiffs prospective declaratory and injunctive relief "will require substantial

financial expenditures by the Legislature..." (Defendants' Brief, p.36) is simply not so.

D. The Legislature's Creation Of The Defined Contribution Plan Does Not Constitute Its Remedy For The Constitutional Violation Proven By Plaintiffs

Defendants suggest that the Legislature has provided a "remedy" for the constitutional violation alleged by Plaintiffs by providing for a defined contribution plan (Defendants' Brief, p.34). It is unclear whether Defendants, in making that argument, concede the existence of a constitutional violation. Nothing in The JRA suggests that its amendment to create the defined contribution plan was enacted to provide a remedy for unconstitutional inequalities existing in the defined benefit plan.

Defendants' suggestion that this Court may not afford relief to Plaintiffs for the constitutional violation because the Legislature has provided a remedy to them by enacting provisions providing for a defined contribution retirement plan is incorrect per this Court's holding in *Sharp*. Perhaps it is also disingenuous.

The amendment to The JRA which created the defined contribution plan also violated Plaintiffs' rights to the equal protection of the laws as guaranteed by Article I, § 2. That is so because, per the terms of The JRA, for those who elected to terminate membership in the defined benefit plan in order to participate in the defined contribution plan the dollar amount transferred from reserves of the JRS to that person's defined

contribution plan account was the actuarial present value ("APV") of the JRS's benefit obligation to the member (MCLA 38.2652a; MSA 27.125(702)) (Pls' Apx., pps.81b-82b), which APV amount for Judges of the 36th District Court of the same age and with the same length of service as Plaintiffs was greater than the APV amount for Plaintiffs since The JRA affords Judges of the 36th District Court a higher retirement allowance under the defined benefit plan.

Moreover, the defined contribution plan also discriminates in favor of active Judges of the 36th District Court to the disadvantage of non-36th District Court Judges. Per the terms of The JRA, the State of Michigan contributes to each defined contribution plan qualified participant's account an amount equal to four percent of the qualified participant's "salary", which is defined as the salary paid by the State of Michigan. Since Judges of the 36th District Court receive a higher salary paid by the State of Michigan than non-36th District Court judges, those 36th District Court Judges who are participants in the defined contribution plan receive a larger annual contribution to their defined contribution plan account than non-36th District Court Judges who also participate in the defined contribution plan. See MCLA 38.2656(3); MSA 27.125(706) and MCLA 38.2664(2); MSA 27.125(714) (Pls' Apx.,pps.83b and 85b). Therefore, the amendment to The JRA which created the defined contribution plan also violates the Equal Protection Clause although that plan is not at issue in this action.

E. Article IX, § 24 Of The Constitution Does Not Preclude This Court From Affording Plaintiffs The Relief Sought

Defendants argue that Mich Const. 1963, Article IX, § 24 precludes this Court from granting injunctive relief (Defendants' Brief, p.36). Defendants are wrong. Article IX, § 24 provides in part:

> The accrued financial benefits of each pension plan and retirement system of the state and its political subdivisions shall be a contractual obligation thereof which shall not be diminished or impaired thereby.

Article IX, § 24 in no way limits this Court's ability to declare unconstitutional provisions of The JRA or any other public retirement plan. Rather, the intention of Article IX, § 24 "...was to obviate the harsh rule that pensions granted by public authorities were not contractual obligations, but gratuitous allowances which could be revoked at will" (*Association of Professional and Technical Employees v City of Detroit*, 154 Mich App 440, 444; 398 NW2d 436 (1987), citing this Court's opinion in *Advisory Opinion Re: Constitutionality of 1972 PA 258*, 389 Mich 659, 662-663-209 NW2d 200 (1973)). A decision by this Court concluding that the provisions of The JRA attacked by Plaintiffs are unconstitutional and prohibiting their enforcement by Defendants does not constitute an action of the State or political subdivision impairing a contractual obligation to provide a retirement benefit. Therefore, Article IX, § 24 does not affect

this Court's power to grant the relief requested.

Defendants also argue that a decision by this Court declaring provisions of The JRA unconstitutional and enjoining their enforcement would have harsh results on retirees currently receiving retirement benefits under the Tier 1 Plan. Plaintiffs agree, and are aware that such an order could have an adverse effect even on them. It is not Plaintiffs' wish that retirement benefits be discontinued to any retired Judge or to any beneficiary of a retired Judge. Plaintiffs seek only to receive only the same level of benefits afforded to their peers, i.e. retired Judges and beneficiaries of retired Judges of the 36th District Court. Plaintiffs have shown how that can occur without impact on the State Treasury and without stepping on the Legislatures' toes.

However, if this Court believes that it may not afford prospective relief by ordering payments out of reserves out of the JRS, or if it declines to do so, it clearly could declare the provisions of The JRA in question unconstitutional and enjoin implementation of its retirement benefit payment provisions as of a date certain in the near future, with the expectation that the Legislature would promptly amend The JRA to correct the Equal Protection violations and avoid an interruption of the payment of retirement benefits. See *Shavers v Attorney General*, 402 Mich 554, 609-610; 267 NW2d 72 (1978). Indeed, in *North Ottaway Community Hospital v Kieft*, 457 Mich 394, 408 n.14; 578 NW2d 267 (1998), a decision which this Court directed the parties to

consider, it appears that this Court also took action similar to that. This Court eliminated the equal protection violation that it found to exist and left it to the judgment of the Legislature as to how best to correct the violation. If the Legislature declines or refuses to correct a constitutional deficiency in the JRA declared by this Court, then the adverse impact on retirees is the fault and responsibility of the Legislature. Nevertheless, that possibility should not deter this Court from performing its constitutional mandate to enforce Plaintiffs' Equal Protection rights.

CONCLUSION AND RELIEF

For all of the foregoing reasons, Plaintiffs request that this Court affirm the ruling of the Court of Appeals in *Harvey II* and declare that the provisions of The JRA under scrutiny here violate Plaintiffs' rights to Equal Protection as guaranteed by Article I, § 2 of the Michigan Constitution. As a remedy, Plaintiffs request that this Court order Defendants to forthwith begin to pay Plaintiffs from reserves of the JRS a retirement benefit equal to that which they would have received had they retired at the same age with the same length of service but had served in the 36th District Court. Alternatively, for its remedy Plaintiffs request that this Court proclaim that Defendants will be enjoined from paying any retirement benefits as of a date certain in the near future, thereby affording the Legislature the opportunity to enact an amendment to the JRA eliminating the unconstitutionally disparate treatment.

Respectfully submitted,

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